No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 111

FRED PINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 711–719) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 26, 1943 (R. 719), and a petition for rehearing (R. 719–729) was denied May 25, 1943 (R. 729). The petition for a writ of certiorari was filed June 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether *Athanasaw* v. *United States*, 227 U. S. 326, which holds that the Mann Act applies to the interstate transportation of a woman or girl for the purpose of placing her in surroundings that tend "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually," should be overruled.

2. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

3. Whether the trial court erred in failing to give instructions requested by petitioner.

4. Whether the record shows any misconduct on the part of government counsel that constitutes reversible error.

STATUTES INVOLVED

The Act of June 25, 1910, c. 395, Sec. 2, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for

any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such

parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On June 15, 1940, petitioner, Al Youst, Evelyn Clark Youst, and Carroll King were indicted, in the District Court of the United States for the Southern District of Florida, for conspiracy to violate the Mann Act. Petitioner secured a severance, Al Youst and Evelyn Clark Youst were tried and convicted, and there was a mistrial as to King, who was taken ill during the trial.[1]

On July 31, 1941, petitioner was separately reindicted for the same conspiracy (R. 1–4). The indictment charged him with having conspired with Al Youst, Evelyn Clark Youst, Rachel Clark, and Carroll King, to bring about the transportation of seven named women and girls,[2] and other women and girls whose names were to the grand jurors unknown,[3] from Chattanooga, Tennessee,

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[1] Neither the original indictment nor any of the proceedings thereunder are included in the record here. See in support of the statements in the text, R. 207, 233, 235, 298, 341, 643, 659–660.

[2] Mary and Frances McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, and Frances Jobe (R. 2).

[3] The Government's bill of particulars (R. 15–22) identified Rachel Clark (R. 19, 22) as the only one of the women and girls (R. 2) previously unnamed who was known to have been transported in furtherance of the conspiracy.

Atlanta, Georgia, and other places, to Dade County, Florida, to work for Palm Lake Development, Inc., a corporation owning and operating the La Paloma Club, amid surroundings and conditions tending to induce and influence them "to give themselves up to a condition, form and type of debauchery that would naturally lead them to a course of sexual immorality" (R. 1–2). Ten overt acts were alleged.

Petitioner's first trial, in October 1941, ended in a mistrial (see R. 157, 463, 659–660). On a second trial he was found guilty by a jury (R. 22–23, 692) and was sentenced to two years' imprisonment and to pay a fine of $1,000 (R. 24). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the conviction was affirmed (R. 711–719).

Petitioner does not challenge the sufficiency of the evidence which establishes the conspiracy alleged in the indictment, and admits (Pet. 7) that, pursuant to the conspiracy, women and girls were brought from other states to the La Paloma Club where they were placed in conditions and surroundings of debauchery of the kind that would lead naturally and inevitably to sexual immorality.[4] He denies only the sufficiency of the evidence

[4] Throughout the time that the club was in operation, except when the "heat" was on, the entertainment was lewd, lascivious, suggestive, and depraved (R. 90–92, 94, 98–99, 135, 168–169, 173, 186–187, 188, 195, 204, 206, 208–209, 231, 306, 371, 389, 418–421, 429). Except when the "heat" was on, petitioner both witnessed and encouraged performances of such

to show that he was a party to or had knowledge of such conspiracy or any acts done in furtherance thereof (Pet. 16, 20, 25–26, 41, 45–46). We shall therefore summarize only that portion of the evidence upon which we rely to show petitioner's participation in the conspiracy:

Petitioner was born in 1890 and has practiced law at Miami, Florida, since 1914 (R. 529, 595–598). Most of his practice has been in the field of criminal law, both as the county solicitor of Dade County, Florida (where the La Paloma Club was located), and as defense counsel (R. 533, 596–598). Prior to December 31, 1938, Al Youst operated the La Paloma Club at 24th Avenue and 79th Street in Miami (R. 87, 526). The club had been raided by the Ku Klux Klan in the fall of 1937 (R. 34, 37, 88, 110, 601–602), and petitioner was asked

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a character (R. 95, 122, 195, 285, 317–318, 432, 548). Several of the girls who were induced to come from other states testified to having never previously seen or participated in performances of the type put on at the La Paloma Club (R. 306, 371–372, 384, 412, 429–430). Most of the girls used as entertainers and dancers were under age (R. 91, 102, 136, 140, 166, 170, 172, 183, 208, 304, 369, 383, 410). Sexual relations at the club were free and easy (R. 93–95, 108–109, 135–136, 307, 403, 408). The main topic of conversation among the employees was sex (R. 99, 125, 169). There was testimony that petitioner frequently talked sex and forms of sex perversion with the girls (R. 95, 96, 98, 115–118, 125), and that he engaged in an unnatural form of sexual intercourse with one of them (R. 134–135, 142, 153, 162, 167, 174) and made advances to another (R. 318, 326–327, 333–339); and that Youst made advances to several others (R. 372–373, 381, 390–391, 431, 443).

and paid by Youst to take the "heat" off the club by taking care of the local "stiffs" (R. 34, 36). Shortly thereafter, in November or December, 1937, the club was raided by officers from the County Solicitor's Office of Dade County, Florida (R. 37, 38, 110), and Youst and his entertainers were placed in jail (R. 602). Petitioner secured their release from jail (R. 529–530, 603, 606–607), and instructed the witness Harkette to impress upon the employees of the club, who were called to testify at a hearing before the County Solicitor, "that they never saw any strip tease dances and never saw any girl expose her body at any time and nothing obscene" (R. 38). As a result of their testimony at this hearing Youst and King were subsequently charged with perjury and defended by petitioner (R. 516–519, 531–532, 606). As a further outgrowth of the investigation by the County Solicitor both an injunction proceeding and criminal informations were filed against Youst, charging him with maintenance of a public nuisance on the basis of the lewd and lascivious character of the entertainment at the La Paloma Club. In these proceedings Youst was represented by petitioner, on whose advice Youst allowed an injunction decree to be entered by consent and pleaded *nolo contendere* to the criminal information (R. 525–528, 554–558). Petitioner also represented Youst or the club in a number of other legal proceedings (R. 514–528, 560–561).

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Because of having been convicted of burglary Youst was unable to secure a liquor license (R. 601, 610). In the latter part of 1938 he purchased, in the name of his sister, Mrs. MacNichol, a five-acre tract at 27th Avenue and 79th Street, three blocks away from the old location (R. 88, 534, 536). Construction of a new clubhouse and a number of cottages was completed under the supervision of Bert Reeves (R. 52). Petitioner was frequently present while the work was in progress (R. 56–57, 210). At the solicitation of petitioner, and with $1,500 secured at petitioner's office, Holmes Allen applied for and received a liquor license in the name of the "Palm Club," which petitioner represented to Allen was to be run by a partnership consisting of petitioner, Reeves, and Allen (R. 67–68, 71). Thereafter, early in 1939, Palm Lake Development, Inc., was organized with petitioner, Reeves, and Allen as the original incorporators. Reeves was president, Allen vice president, and petitioner secretary-treasurer. Of the 20 shares issued, 10 were issued to Youst's sister, Mrs. MacNichol, 7 to her husband, 2 to petitioner, and 1 to Reeves which he never received and subsequently indorsed over to aid the corporation in securing a loan. The property on which the buildings had been erected was transferred by Mrs. MacNichol and her husband to the corporation. (R. 52–58, 61–64, 66, 71–74, 537, 539–541, 575, 611–612.) Subsequently, in September 1939,

by falsely representing that Youst had nothing to do with the management of the club but was merely to be manager of the floor show, petitioner secured a transfer to the corporation of the liquor license that Allen previously had procured in the name of the "Palm Club" (R. 48–51, 52–54, 57, 59–60, 69, 72, 75–79, 80–82, 84–87, 546–547). After discovering that the entertainers from the old club had made their appearance at the new club (R. 68, 88, 96–97, 239, 547–548), Allen resigned as president out of "self-respect" (R. 68, 70, 72–73). Reeves then became president and Frank Talley, orchestra leader at the club, became vice president (R. 538–539).

The minute-book of the corporation was kept at all times in petitioner's law office (R. 470, 486, 609). Checks issued by the corporation required the signatures both of petitioner as secretary-treasurer and of Youst as general manager (R. 58–59, 471, 476, 487, 609–610). Petitioner referred to himself, was referred to by others, and was responsible for his being so referred to by others, as the "owner" and "boss" of the club (R. 112–114, 169, 174, 176, 179, 212, 248, 253, 257, 277, 286–287, 293, 321, 351, 415, 423, 434, 578, 620, 636–637).[5] When the "heat" was on the

[5] The government witness, Evelyn Clark Youst, testified: "He [petitioner] would tell me to call all the girls at the bar and introduce him as the boss and he was the owner of the La Paloma Club and my husband was just a manager there * * * Almost every time he would be out there he

club, but only then, he would instruct the girls not to put on the type of performances that had drawn the "heat" (R. 212, 231–232, 247, 253, 415–416, 420–421). He referred to himself before them, and was regarded by them, as the "boss" (R. 112–114, 174, 212, 248, 253, 257, 277, 286–287, 293, 321, 351, 415, 423, 434). He was frequently at the club (R. 37–39, 56–57, 88, 89, 134, 171, 187, 209, 210, 301, 317, 391, 415, 431, 445, 544, 545, 548). On his visits to the club he would go behind the bar, "look in the cash register or punch some of the waiter's pads," engage in conversation with Youst as to the management, go over the books with Youst, and receive money from Youst (R. 210–212, 213, 247–248, 250–253, 393, 432–433).

Petitioner himself testified that he knew as early as the spring or summer of 1939 that some of the girls had come from New Orleans (R. 636). One of the girls whom Youst had brought from New Orleans in the fall of 1938, testified that after her arrival at the club petitioner had introduced himself to her saying "You are one of the crew Al brought up here?" (R. 184–185, 189, 192–195).

There was further evidence that petitioner knew that other girls had been transported from other states. In March 1939, Evelyn Clark Youst, a co-conspirator who had begun working at the La

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would say 'I am the owner of the club,' to bring in the new girls and to introduce them as he was the boss" (R. 212).

Paloma Club in November 1938 (R. 208, 238) and became the mistress and later the wife of Youst (R. 210–211, 215, 236, 243), made a trip to her home at Chattanooga, at Youst's request, to get girls to work at the La Paloma Club.[6] She traveled at the club's expense. She got in touch with Betty Martin Tinker in Chattanooga, who came to Miami around Easter, 1939, on money wired her by the club (R. 217–219, 274–277, 369–371, 375–377). Mrs. Tinker testified that upon being introduced to her, petitioner said "So you are from Chattanooga too" (R. 374).

Again, in June 1939, Rachel Clark, Evelyn's sister, who had come from Chattanooga to Miami the preceding January at Evelyn's request (R. 214), returned to Chattanooga. Before she left petitioner told her "if you find any girls as cute as you are, bring them down" (R. 320, 329–331, 333, 366–367, 562, 581, 638). Carroll King, a co-conspirator and bartender at the club, accompanied Rachel as far as Atlanta, and it was common gossip at the club that they were going to bring back "some cute ones" (R. 219–220, 264–265, 307–309). At Chattanooga Rachel put an advertisement in the Chattanooga Times for June 28, 1939 (R. 309–310). The McCullar sisters and Billie Johnson answered this advertisement (R.

[6] She testified: "We were always looking for new girls, new talent all the time. Every time I would go on a vacation my husband would always tell me to bring back some new girls" (R. 213, 216, 257).

310–311, 384–386, 412). At Atlanta, King secured Ann Bennett and Jessie Asher (R. 504–505, 508). King then drove to Chattanooga, brought the McCullar sisters and Billie Johnson to Atlanta, there picked up Jessie Asher and Ann Bennett and returned with the five to Miami about June 30 or July 1, paying for gasoline and their meals *en route,* with money advanced to him by Mrs. Irene Clark, the mother of Evelyn and Rachel (R. 221, 225–226, 385–388, 396, 413, 505, 509). Mrs. Clark was reimbursed by a check from the Palm Lake Development, Inc., signed by both Youst and petitioner (R. 223–225, 266–269, 311). Shortly after the arrival of these five girls at the club Evelyn introduced petitioner to them as their "boss," pursuant to his expressed desire "to meet the babes from Tennessee" (R. 226, 423). Upon being introduced to them petitioner said "you are the babes that Carroll King brought down from Tennessee?" (R. 391, 392, 405, 415).

Rachel Clark returned to Miami at Evelyn's request on money supplied by their mother, who was reimbursed by a check from the Palm Lake Development, Inc., signed by both Youst and petitioner (R. 226–228, 263, 270–274, 312–313). Evelyn testified that there was some delay in securing petitioner's signature on the check, and that contrary to the usual practice of his signing checks in advance, before they were made out, he did not sign this one until after the payee's name had

been inserted and Youst had signed it (R. 228, 271–273). She also testified that while Rachel was away petitioner said to Youst in her presence that since Youst had Evelyn, "when Rachel would come back he [petitioner] was going to have Rachel" (R. 229, 262, 280). Rachel testified to a previous request from petitioner that he be permitted to have unnatural relations with her (R. 318, 326–327, 333–339).

While denying knowledge of Youst's activities in procuring girls, petitioner admitted on cross-examination that had he been told how Youst was getting them it would have made no difference—it would have been "all right" with him (R. 631). He did not deny having been consulted by Carroll King, at the request of Youst, as to whether the newspaper advertisements for dancers and entertainers might get them "into trouble with the white slave law" (R. 631–632). Petitioner actively aided Youst in keeping at the club girls under age who were being investigated by the probation authorities. Thus, in August 1939, Youst brought Vicki Van Payne, Ileen Randall, and Patricia O'Hara to petitioner's office, for the purpose of having him straighten out the difficulties and enable them to continue working at the club. Petitioner told them that thenceforth he would be their legal guardian (R. 132–134, 142, 165–166, 171–173). Although being told that Patricia O'Hara was eighteen (R. 172), petitioner wrote

out a telegram stating that she was born October 27, 1917, which was forwarded by mail to her grandmother who, at the girl's request, sent petitioner the telegram he himself had composed (R. 172–173, 572–573). He turned it over to the juvenile authorities (R. 634).

Following the raid by the Federal Bureau of Investigation on March 26, 1940, Evelyn Clarke Youst and Rachel Clark made statements to officers of the Bureau implicating petitioner and Youst. Petitioner urged them to retract these statements when called to testify at the preliminary hearing before the United States Commissioner, and to say that they were told to make them by the officers. Since it was "big men like Al and Fred" that the F. B. I. were after and "they would not put kids like us in jail," the girls should testify in such a way as to throw the whole responsibility on Evelyn. In that way everyone would "beat the rap," and they would then put up a big sign saying: "We beat the Ku Klux Klan, county and state, and beat the sheriff's office and now we beat the Federal Government. This is Youst's and Pine's notorious night club. We are going to show you everything" (R. 233–237, 294–297, 323–324, 359, 363). The Government's witness Laura Baker testified that after the F. B. I. raid both Youst and petitioner had requested that she say nothing to the authorities (R. 101–102, 121–122) about her having spent a

night at a local hotel, at the request of Youst, with a man whose aid in securing a liquor license Youst desired to obtain (R. 94).

ARGUMENT

I

Petitioner asks (Pet. 18, 23–24, 33–39) this Court to overrule *Athanasaw* v. *United States*, 227 U. S. 326, which holds that the Mann Act applies to the interstate transportation of a woman or girl for the purpose of placing her in surroundings that tend "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually." He contends that this interpretation deprives the statute of an ascertainable standard of guilt and constitutes an unwarranted extension of its compass.

The *Athanasaw* case was decided in 1913, less than three years after the statute's enactment, by a unanimous court. It has been followed by the lower federal courts.[7] By allowing the statute to remain unamended, Congress has acquiesced in this long-standing judicial construction of it.[8]

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[7] *United States* v. *Lewis*, 110 F. (2d) 460 (C. C. A. 7), certiorari denied, 310 U. S. 634; *Beyer* v. *United States*, 251 Fed. 39 (C. C. A. 9); *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.); *United States* v. *Brand*, 229 Fed. 847 (S. D. N. Y.); *United States* v. *Long*, 16 F. Supp. 231 (E. D. Ill.).

[8] Cf. *United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 500; *Beale* v. *United States*, 71 F. (2d) 737, 739 (C. C. A. 8).

We submit that the *Athanasaw* decision is an application of the plain meaning of the statute rather than a judicial enlargement of it, and that neither as written nor as thus applied does the statute violate the "void for vagueness" rule upon which petitioner relies. While the words of the statute, "debauchery," "any other immoral purpose," and "any other immoral practice," apart from their context, might be given an extremely wide application, they are restricted contextually to debauchery and immoral purposes or practices of a sexual character.[9] But as was ruled in the *Athanasaw* case, the statutory language does not require that the immediate objective be sexual intercourse. It is clearly sufficient if the surroundings to which the girl is taken are such as to conduce naturally to sexual immorality. Such a construction of the statute can do no violence to the common understanding of the words "debauchery" or "immorality" when confined as they are to sexual looseness.[10] Petitioner does not con-

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[9] *United States* v. *Lewis*, 110 F. (2d) 460, 462 (C. C. A. 7), certiorari denied 310 U. S. 634; *Suslak* v. *United States*, 213 Fed. 913, 917 (C. C. A. 9); *King* v. *United States*, 55 F. (2d) 1058, 1061 (C. C. A. 10); *Burgess* v. *United States*, 294 Fed. 1002, 1004 (App. D. C.).

[10] Construed in the light of common understanding of the terms used, the statute and the language of this Court in the *Athanasaw* case are no less precise and definite as a guide to conduct than are the various federal and state obscenity statutes. See *Dunlop* v. *United States*, 165 U. S. 486, 500–501; *Clark* v. *United States*, 211 Fed. 916, 918 (C. C. A. 8); *Moens* v. *United States*, 267 Fed. 317 (App. D. C.); *Commonwealth*

tend—and in view of the evidence he obviously could not successfully contend—that the La Paloma Club was not within common understanding "an efficient school of debauchery of the special immorality"[11] that the statute was designed to cover. Consequently, the interstate transportation of a woman or girl into such surroundings, for the purpose of having her participate in or be present at the sexual exhibitions and acrobatics performed there, can be deemed nothing less than transportation for an "immoral purpose" or the purpose of "debauchery," giving those terms of the statute their common understanding. To say the contrary "would shock the common understanding of what constitutes an immoral purpose." *Caminetti* v. *United States*, 242 U. S. 470, 486.

Accordingly, there is even less basis for asking this Court to reconsider the *Athanasaw* decision than there was for the request, rejected at the last Term,[12] that it reconsider and overrule its decision in *Caminetti* v. *United States*, 242 U. S. 470, which held the Mann Act applicable to noncommercialized vice. The two decisions are parts of

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v. *New*, 142 Pa. Super. 358, 16 A. (2d) 437 (1940); *People* v. *Wendling*, 258 N. Y. 451 (1932); *People* v. *Pesky*, 230 App. Div. 200 (1930), affirmed, 254 N. Y. 373 (1930). Cf. *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230, 245–246. Cf. *United States* v. *Bitty*, 208 U. S. 393, 402.

[11] *Athanasaw* v. *United States*, 227 U. S., at 333.

[12] *Reginelli* v. *United States*, No. 767, October Term, 1942, certiorari denied, April 5, 1943.

a single pattern of interpretation accepted in the early years of the statute's enforcement and consistently applied since.[13]

II

In rejecting petitioner's contention that the evidence does not support the verdict, the circuit court of appeals, while stating that the evidence made it clear that petitioner "knew both generally and particularly what was going on at the club" (R. 717), held that it was not necessary for the Government to prove that petitioner "had knowledge of the purpose to bring or the actual bringing in of a particular girl"; that "It was sufficient to show that he knew of, and was a party to, a general plan or conspiracy to transport girls or women unlawfully in interstate commerce" (R. 718). But petitioner, while denying that the evidence showed any such general conspiracy, asserts that by the indictment (R. 2) and bill of particulars (R. 22) he was placed on trial for conspiring to transport certain specific individuals, and that the circuit court of appeals was therefore in error in sustaining his conviction on the basis

[13] If, as we submit, the statute means what this Court said it meant in the *Athanasaw* case, it cannot matter that the draftsmen of the indictment in the case at bar utilized the language of that decision rather than the terminology of the statute, as petitioner points out (Pet. 38), An indictment need not follow the statutory language; it is sufficient if it alleges the elements of the offense. See *Moens* v. *United States*, 267 Fed. 317, 320–322 (App. D. C.); *United States* v. *Altman*, 8 F. Supp. 880, 884 (W. D. N. Y.).

of a more general conspiracy (Pet. 7–11, 16, 20, 25–26, 41, 45–46).

It is unnecessary, we believe, to determine whether the conspiracy charged was as narrow in scope as petitioner insists, since the evidence, we submit, was sufficient to make petitioner a party either to a general conspiracy to transport girls as needed, or to a narrower one to transport specific individuals. Under settled principles of the law of conspiracy, petitioner may be tied into a conspiracy of the latter type even though he may never have heard of any particular girl or been aware of the specific circumstances of her transportation; and, of course, it was not necessary to show that all of the girls named were transported pursuant to the conspiracy, or indeed for that matter that any of them were so transported, since it is not necessary to establish that a substantive offense was committed.

Petitioner's position that the evidence does not support the verdict is apparently predicated to a large extent upon the erroneous assumption that there must be "direct or positive testimony or proof" (Pet. 4) of his guilty connection with the conspiracy charged. But it is settled that no formal agreement is essential to the formation of a conspiracy [14] and that the existence of an agreement

[14] "Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters." *Direct Sales Co., Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943. The existence of an

may be shown by inference from acts, conduct, and attendant circumstances.[15] A conspiracy is often susceptible of proof in no other way than by a collocation of circumstances tending to sustain the inferences necessary to support the verdict,[16] and one who knowingly cooperates to further the objects of a conspiracy thereby becomes a party to it.[17] It is not essential that he under-

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agreement is sufficiently shown by concert of action, "all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *Fowler* v. *United States*, 273 Fed. 15, 19 (C. C. A. 9); *Marino* v. *United States*, 91 F. (2d) 691, 694 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Stack* v. *United States*, 27 F. (2d) 16, 17 (C. C. A. 9). It is sufficient if there is a mutual implied understanding, and cooperation in furthering the purposes of the unlawful enterprise. *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Allen* v. *United States*, 4 F. (2d) 688, 691 (C. C. A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U. S. 598.

[15] *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8); *Telman* v. *United States*, 67 F. (2d) 716, 717 (C. C. A. 10), certiorari denied, 292 U. S. 650; *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Harrison*, 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661.

[16] *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Direct Sales Co., Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943.

[17] *Allen* v. *United States*, 4 F. (2d) 688, 698 (C. C. A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U. S. 598; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

stand the entire scope of the conspiracy. It is sufficient if he knows its purposes in a general way and participates in their furtherance.[18] More specifically, in prosecutions for conspiracy to violate the Mann Act "the jury may infer intent from all the circumstances in evidence," and evidence of the conduct of a party after the transportation has been completed may be sufficient to sustain his conviction.[19] And of course the evidence, with the inferences reasonably to be derived therefrom, must be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U. S. 60, 80.

The evidence set forth in the Statement, *supra,* clearly shows that as early as November or December, 1937, the nature of petitioner's contacts with Youst and the La Paloma Club was sufficient to put him on notice as to the kind of a place it was, and that the transportation to it from out-of-state of any women or girls to serve as entertainers would constitute a violation of the Mann Act. Petitioner was further warned by the nature of

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[18] *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C.C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

[19] *Shama* v. *United States*, 94 F. (2d) 1, 4 (C. C. A. 8), certiorari denied, 304 U. S. 568; *Kelly* v. *United States*, 297 Fed. 212 (C. C. A. 9).

the state court proceedings filed against Youst in November 1938, and in which he was represented by petitioner (R. 525–528, 554–558). Despite this knowledge petitioner entered upon a business association with Youst in the operation of the La Paloma Club. To enable the club to have the liquor license necessary to its life, he admits (Pet. 6–7) that he deliberately misrepresented to the County Commissioners the relation of Youst to the club. He became an incorporator, shareholder, and secretary-treasurer of the corporation owning and operating the club, under an arrangement permitting no checks to be issued unless signed by him as well as Youst. Although serving as a "front" for Youst, he was no mere "dummy" as he now contends (Pet. 5) he was. He referred to himself, and was responsible for his being referred to by others, as "owner" and "boss" of the club. By his own testimony (R. 548) as well as by that of others (R. 95, 188, 195, 285, 317–318, 432), he witnessed and encouraged the sexual exhibitions performed as part of the regular entertainment, and was the one who would instruct the girls when the "heat" was on, but only then, to call a halt (R. 212, 231–232, 247, 253, 415–416, 420–421). By his own testimony he callously disavowed any interest in how the entertainers were procured (R. 631), despite the fact of its being common knowledge at the club, where he was frequently present on business, that they

were regularly being brought from other states, and despite the fact of his having signed checks that paid for their transportation. Knowing, according to his own testimony, by the spring or summer of 1939 that Youst had brought some entertainers from New Orleans (R. 636), he introduced himself to one of them (Flora May Richardson) saying "You are one of the crew Al brought up here?" (R. 189, 192–195). To Evelyn Youst he expressed a desire to meet "the babes from Tennessee" and was introduced to them as their "boss" (R. 226, 423), saying to them "You are the babes that Carroll King brought down from Tennessee?" (R. 391, 392, 405, 415). While Rachel Clark, to whom he had made advances (R. 318, 326–327, 333–339), was in Tennessee, he told Youst that as Youst had Evelyn Clark "when Rachel would come back he [petitioner] was going to have Rachel" (R. 229, 262, 280). He actively aided Youst to the point of deliberate deception of the age of girls whom the juvenile authorities were investigating (R. 132–134, 142, 165–166, 171–173). After the raid by the Federal Bureau of Investigation, and before anyone had been indicted, he showed full realization of the extent to which he himself as well as Youst had become incriminated (R. 233–237, 294–297, 323–324, 359, 363).

In sum, the conclusion cannot be avoided that, although petitioner left the details of the manage-

ment of the club to Youst and was not interested in the identity of the particular girls to be procured, he, nevertheless, was generally aware of all that was going on, had a mutual understanding and common purpose with Youst, and actively aided and abetted the consummation of that purpose. The collocation of circumstances sustaining this conclusion is far too strong for him now to assert convincingly complete lack of knowledge or guilty connection with the unlawful purposes and acts of his coconspirators whose "front" he deliberately chose to be. When a conspiracy is established, as it was here, only slight quantitative evidence connecting a particular defendant with it may in the circumstances be substantial and, therefore, sufficient to warrant submission to the jury of the issue of his guilt.[20] Here the evidence was abundant.[21]

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[20] *Meyers* v. *United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas* v. *United States*, 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.

[21] Here, as in *Direct Sales, Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943, "There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy. * * * In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates

III

Petitioner urges as reversible error (Pet. 11–14, 26–28, 32, 46–54) the trial court's refusal to give to the jury petitioner's requested instructions 6, 10, 24, and 29 (R. 679–680, 682, 687–688, 691–692).

Requested instruction No. 6 (Pet. 11; R. 679), to the effect that accomplice testimony "should be received with extreme caution," failed to identify by name Evelyn Youst and Rachel Clark as the only Government witnesses who could possibly have been deemed accomplices of petitioner. The other girls named in the indictment were in no sense accomplices but victims.[22] The requested instruction was therefore, as the circuit court of appeals held, "couched in such general terms as to be misleading" (R. 713).

Furthermore, even as applied solely to accomplice testimony, the giving of an instruction of this nature rests, as the court below held (R. 713–714), in the discretion of the trial court.[23] It is

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conspiracy from overlapping forms of criminal cooperation."

The judge emphasized throughout his charge that in order to convict petitioner the jury must know that he had knowledge of the purpose of the conspiracy and that he intentionally participated in it (R. 663–671).

[22] *Gebardi* v. *United States*, 287 U. S. 112, 118; *Miller* v. *United States*, 95 F. (2d) 492, 494 (C. C. A. 9); cf. *United States* v. *Holte*, 236 U. S. 140; *Mackreth* v. *United States*, 103 F. (2d) 495, 496 (C. C. A. 5).

[23] *United States* v. *Block*, 88 F. (2d) 618, 621 (C. C. A. 2): "It is common practice so to caution a jury, but it is not necessary even when as here the accused asks that it be done"; *United States* v. *Becker*, 62 F. (2d) 1007, 1009 (C. C. A. 2):

"well established" that a conviction under the Mann Act, as under other statutes, "may rest on the evidence alone of a coconspirator or accomplice." *Heitler* v. *United States,* 244 Fed. 140, 144 (C. C. A. 7); *Diggs* v. *United States,* 220 Fed. 545, 552–553 (C. C. A. 9), affirmed *sub nom. Caminetti* v. *United States,* 242 U. S. 470, 495. That the trial court did not abuse its discretion here is plain. The testimony of Evelyn Youst and Rachel Clark was abundantly corroborated by other witnesses who were not accomplices. In this respect the case is materially different from *Freed* v. *United States,* 266 Fed. 1012 (App. D. C.), relied on by petitioner (Pet. 20, 47), where the reversal was for failure to advise the jury "as to the danger of convicting upon the *uncorroborated* testimony of accomplices." 266 Fed. at 1016. (Italics supplied.)

Requested instruction No. 10 (Pet. 12; R. 682) was to the effect that if the jury should find that petitioner had no knowledge of the transportation

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"The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence"; *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2); *Hanley* v. *United States*, 123 Fed. 849 (C. C. A. 2); *Hanks* v. *United States*, 97 F. (2d) 309, 311–312 (C. C. A. 4); *Wainer* v. *United States*, 82 F. (2d) 305, 307–308 (C. C. A. 7); *Wallace* v. *United States*, 243 Fed. 300, 307 (C. C. A. 7); *Hays* v. *United States*, 231 Fed. 106, 110 (C. C. A. 8), affirmed *sub nom. Caminetti* v. *United States*, 242 U. S. 470, 495; *Cheatham* v. *State*, 67 Miss. 335 (1890); *State* v. *Haney*, 19 N. C. 390, 398 (1837).

of any of the named women or girls, or no intent that any of such women or girls would be transported, it must acquit him. This instruction was properly refused. In so far at least as it required knowledge by petitioner of the identity of the girls transported, it introduced an element which, of course, it was not necessary for the Government to establish as a prerequisite to petitioner's conviction upon a charge of conspiracy to transport. Additionally, the trial judge in his charge not only defined the elements of a conspiracy, but correctly delineated the factors which conditioned petitioner's accountability, and over and over again reiterated the essentials of which the jury would have to have a "full, firm, and abiding conviction" in order to hold petitioner guilty (R. 662–673).

Requested instruction No. 24 (Pet. 12–13; R. 687–688) related to the use of circumstantial evidence. A comparison of the requested charge with the one actually given on circumstantial evidence [24] demonstrates beyond question that the cir-

[24] "Circumstantial evidence is the proof of independent facts which if proven beyond a reasonable doubt another fact would follow as a natural or very probable conclusion from the facts that have been proven. Guilt established by circumstantial evidence is an inference of guilt from other facts independently proven. Proof by circumstantial evidence is the proof of one fact by proof of the existence of certain other facts. Guilt, if proven by circumstantial evidence, must to the satisfaction of the jury be reasonabl[y], natural[ly] and probably inferred beyond a reasonable doubt from the circumstances of other facts proven and such inference of guilt

cuit court of appeals was correct in holding that the one given embodied all the essentials of the one requested (R. 715).

Requested instruction No. 29 (Pet. 13–14; R. 691–692) would have told the jury that "the maturity or immaturity and the experience or inexperience" of the women or girls brought to the La Paloma Club were "material facts" for its consideration in determining the question, submitted to it (R. 671–672), as to whether the conditions there were such as would tend to induce them to give themselves up to a condition of debauchery eventually and naturally leading to a course of immorality sexually. As the circuit court of appeals held (R. 715), the Mann Act is not an anti-seduction statute, and the requested instruction was, under the circumstances of this case at least, "a wholly incorrect statement of the law." [25]

The language in *United States* v. *Lewis,* 110 F. (2d) 460, 464 (C. C. A. 7), certiorari denied, 310 U. S. 634, upon which petitioner relies (Pet. 22, 52), did not relate to an instruction given or refused and was used in a case in which the defendants contended that "their exhibitions were intended to be educational and to show the disas-

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must be consistent only with guilt and inconsistent with innocence. These independent facts or circumstantial evidence must be proven beyond a reasonable doubt as independent facts and leading to such conclusion under the rules as I have stated." (R. 672–673.)

[25] *Suslak* v. *United States,* 213 Fed. 913 (C. C. A. 9); *Van Pelt* v. *United States,* 240 Fed. 346, 348 (C. C. A. 4).

trous effects of immoral conduct." However significant may be the maturity or immaturity of a participant in an exhibition of such a character, there is no basis for the application of any such criterion in a case such as this, where education in debauchery, of both participants and spectators, could have been the sole purpose.

IV

Under a heading phrased in large part in the language of this Court's opinion in *Berger* v. *United States,* 295 U. S. 78, 84–85, petitioner makes sweeping charges of misconduct on the part of the prosecuting attorneys, alleged to constitute reversible error although no exception was taken at the trial and no assignment of error was predicated thereon (Pet. 14, 22–23, 28–29, 32, 54–56). Without discussing any specific instances, he in effect asks this Court to search the entire record in the hope of its finding evidence of such misconduct. Space limitations obviously preclude the Government from undertaking any detailed refutation of petitioner's sweeping charges. It suffices to say that the pages of the record cited by petitioner (Pet. 56) carry their own refutation of the existence of any misconduct even remotely resembling that which occurred in the *Berger* case.

On the basis of a "most careful reading of the record" the circuit court of appeals had "no doubt that the conduct of the prosecution did not

constitute reversible error" and was in fact "remarkably free" from anything in the nature of prejudicial misconduct or unfairness on the part of the prosecution, despite a vigorous personal defense by one who was himself an experienced criminal lawyer (R. 713–714).

CONCLUSION

No adequate reason is presented for asking this Court to reconsider its decision in the *Athanasaw* case. Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

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